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SC NO. 73-49

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND R. SULLIVAN and JAMES T. MARSH, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

JOHN A. VOLPE, ex rel.,
Respondents.

CITY OF SACRAMENTO,
a municipal corporation,
Intervenor,

GRANITE CONSTRUCTION COMPANY,
a corporation, and

A. TEICHERT & SON, INC., a corporation,
Respondents in Intervention.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari

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QUESTION PRESENTED

Did the District Court properly find, after a trial on the merits, that the respondents complied with NEPA and the plaintiffs are barred by laches?

STATUTES AND REGULATIONS

This appeal involves the National Environmental Policy Act of 1969 (hereinafter referred to as NEPA)

and the regulations promulgated thereunder. The Council on Environmental Quality (hereinafter referred to as CEQ) issued GUIDELINES FOR FEDERAL AGENCIES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Appendix 1) (36 Fed. Reg. 7724 [1971]), and the pertinent regulations involved in this writ are:

(1) Section 3;

(2) Section 11;

(3) Section 12.

The Federal Highway Administration issued its draft interim memorandum entitled *Implementation of Section 102(2)(C) of the National Environmental Policy Act of 1969* (now Policy and Procedural Memorandum 90-1). The pertinent section of said memorandum is Section 4 (Appendix 2).

STATEMENT OF CASE

Introduction

In order to simplify the response to petitioners' petition for writ of certiorari, respondents in intervention Granite Construction Company and A. Teichert & Son, Inc., as well as respondents, file the instant brief on behalf of all respondents.

The highway project involved in this matter is Interstate 5. The termini of this interstate project are the Canadian and the Mexican borders. It traverses the States of Washington, Oregon, and California for a distance of approximately 1,382 miles. All but 40 miles of Interstate 5 in California is complete, except

minor alterations from Redding, California, to Oregon (Appendix 3, Findings of Fact and Conclusions of Law, page 28).

The portion of Interstate 5 involved in this litigation is a 19-mile segment of highway and, for the convenience of this Court, will be referred to as Interstate 5.

Interstate 5 is located in Sacramento, California, and was jointly and independently studied by the State of California, County of Sacramento, and the City of Sacramento. Public hearings were held on the location of this project. These hearings were well attended by the public, and received a great amount of exposure in the local press (Appendix 3, Findings of Fact and Conclusions of Law, page 32).

After these public hearings, Interstate 5 received location approval, design approval, and right of way authorization from the Federal Highway Administration (Appendix 3, Findings of Fact and Conclusions of Law, page 32).

State respondents commenced right of way acquisition, which involved the displacement of approximately 500 individuals (Appendix 3, Findings of Fact and Conclusions of Law, page 33). All the right of way has been acquired, individuals displaced, and the project is now under construction.

Trial on the Merits

Interstate 5 was an "ongoing" project when NEPA was enacted. State respondents had received location

approval, design approval, and right of way authorization prior to its effective date, January 1, 1970. After the enactment of NEPA, the Federal and State respondents reassessed this project pursuant to the CEQ's Guidelines, Section 11, and the Federal Highway Administration Interim Guidelines, Section 4. This reassessment occurred on February 17, 1971 (Appendix 3, Findings of Fact and Conclusions of Law, pages 35, 36). Said respondents concluded that it was not practical to alter the basic course of action on Interstate 5, and that this project was developed in such a manner as to minimize adverse environmental consequences (Appendix 3, Findings of Fact and Conclusions of Law, page 36).

Environmental fact sheets were prepared by State respondents and submitted to the Federal Highway Administration. Said environmental fact sheets contained detailed discussions of some, but not all, of the factors considered by the respondents in the reassessment of this project (Appendix 3, Findings of Fact and Conclusions of Law, page 36). The Federal Highway Administration approved the environmental fact sheets, and concluded that an environmental impact statement was not required on the project (Appendix 3, Findings of Fact and Conclusions of Law, pages 36, 37).

At the trial of this action, the parties presented expert testimony on the impact this project would have on the quality of human environment. The respondents presented evidence on each of the alleged

impacts as contained in the complaint, and established to the satisfaction of the Court that these factors were adequately considered by the respondents in the development of this project (Appendix 3, Findings of Fact and Conclusions of Law, pages 41, 42).

Additionally, the respondents modified the project so as to minimize its impact on the quality of human environment. One such modification was the addition of sound barriers, in order to protect development that existed at the time of route adoption (Appendix 3, Findings of Fact and Conclusions of Law, page 42).

After the trial of this action, which encompassed five days, the District Court held that the respondents had complied with NEPA and its implementing regulations. The District Court concluded that the guidelines gave proper effect to the provisions of NEPA as to "ongoing" projects. The District Court further concluded that the respondents did not abuse their discretion in determining that it was not practical to alter the basic course of action on this project (Appendix 3, Findings of Fact and Conclusions of Law, page 43).

Laches

Petitioner Sullivan resides approximately three-fourths mile from the nearest point at which Interstate 5 passes. Petitioner Marsh resides approximately 600 feet from Interstate 5, and has resided in this dwelling since 1964. He has known of the plans for this project since that time (Appendix 3, Findings of Fact and Conclusions of Law, pages 28, 29).

Both petitioners were aware of the proposed construction of Interstate 5 for several years prior to the start of actual construction. They undertook no investigation to determine if an environmental impact statement had been prepared. Petitioner Sullivan contacted the Environmental Defense Fund concerning this project in early July, 1972, prior to the award of any construction contracts (Appendix 3, Findings of Fact and Conclusions of Law, page 41). This suit was not filed until November 2, 1972, after:

(1) right of way acquisition at a cost of $12,347,195.00 (Appendix 3, Findings of Fact and Conclusions of Law, page 33),

(2) displacement of 500 individuals (Appendix 3, Findings of Fact and Conclusions of Law, page 33),

(3) substantial right of way clearance (Appendix 3, Findings of Fact and Conclusions of Law, page 33),

(4) utilities relocated at a cost of $1,405,196.58 (Appendix 3, Findings of Fact and Conclusions of Law, page 33),

(5) plans and engineering completed at a cost of $3,500,000.00 (Appendix 3, Findings of Fact and Conclusions of Law, page 40),

(6) award of construction contracts in the amount of $18,524,050.00 (Appendix 3, Findings of Fact and Conclusions of Law, pages 37, 38), and

(7) payments to the contractors in the amount of $2,500,000.00 (Appendix 3, Findings of Fact and Conclusions of Law, page 40).

The District Court concluded that petitioners unreasonably delayed bringing this action, and by reason of their delay the respondents would be unjustly harmed by the issuance of an injunction.

ARGUMENT

I. The Respondents complied with NEPA and its implementing regulations.

There was a five-day trial on the merits of the action. The District Court received evidence on the alleged adverse impact this project would have upon the quality of human environment, the respondents' consideration of the environment in the development of this project, the investigation and studies made by the respondents on each of the alleged impacts, the respondents' compliance with NEPA, and the factual background on the issue of laches.

At the conclusion of the trial, the District Court denied petitioners' request for injunctive relief on two independent grounds:

(1) the respondents complied with NEPA, and

(2) the petitioners are barred by laches.

Petitioners apparently have confused the District Court decision and seem to assert that NEPA was not complied with because an environmental impact statement was not prepared. An environmental impact statement is not always synonymous with NEPA. It

is a part of, and a very important part of, NEPA. However, the implementing regulations prescribe under what circumstances a project complies with NEPA. Therefore, one must examine these implementing regulations to determine if NEPA has been complied with by the respondents in the development of this project.

In enacting NEPA, Congress was aware of the fact that highway projects take from five to ten or fifteen years from conception to completion. Congress did not intend that NEPA should stop all pending public projects and start them anew. Otherwise, Congress would have expressly provided for the retroactive application of NEPA. This it did not do.

The CEQ, the agency charged with the duty of implementing and enforcing NEPA, promulgated regulations. The regulations directed Federal agencies to establish procedures for compliance with NEPA consistent with the guidelines. (Appendix 1, Council on Environmental Quality, Guidelines, Sections 3 and 12.)

The CEQ was concerned with "ongoing" projects, that is, projects that were initiated prior to the effective date of NEPA. Interstate 5 is such a project. Section 11 of the CEQ Guidelines addresses itself to this issue and provides:

> "11. *Application of Section 102(2)(C) procedure to existing projects and programs.* To the maximum extent practicable the Section 102(2)(C) procedure should be applied to further major

federal actions having a significant effect upon the environment even though they arise from projects or programs initiated prior to the enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental federal actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program." (emphasis added)

In *Environmental Law Fund* v. *Volpe,* 340 F. Supp. 1328 (D.C.N.D. Cal. 1972), the court discusses the application of NEPA to ongoing projects and states on pages 1331 and 1332:

"The CEQ Guidelines make a clear distinction between projects initiated before January 1, 1970 and projects initiated after January 1, 1970. For the latter an environmental impact statement is required 'to the fullest extent possible' but for the former a statement is required only 'to the maximum extent practicable'. This distinction is in concert with the legislative history and the general principles against retroactive application of statutes.[5] Plaintiffs contend that the NEPA should apply in toto to ongoing projects but fail to cite any persuasive authority that this was the intent of Congress. The court agrees with the reasoning in *Elliot* v. *Volpe,* 328 F.Supp. 831 (D. Mass. 1971) that one must distinguish between projects initiated before January 1, 1970 and projects initiated after January 1, 1970."

Pursuant to the mandate of the CEQ, the Federal Highway Administration issued its memorandum to implement NEPA (Appendix 2). Section 4(b) of said memorandum addresses itself to ongoing projects, and provides in part:

> "4. APPLICATION
> "b. The provisions of this memorandum do not apply to projects that received or receive design approval before February 1, 1971. . . ."

Although Interstate 5 received design approval prior to February 1, 1971, it is on a new location. For projects on a new location, Section 4(c) is controlling, and provides in part:

> "c. However, the following two types of projects must be reevaluated by the SHD [State Highway Department] even though such projects received design approval before February 1, 1971:
> "(1) projects on new location, . . .
>
> * * *
>
> "The SHD's reassessment, which shall be done in consultation with the division engineer, shall be made to determine if such projects were developed in such a manner as to minimize adverse environmental consequences. Such projects, to the extent practicable, should be modified to incorporate additional elements of features identified and considered prudent to minimize harm. No environmental statement need be submitted, however, unless requested by the division engineer."

The District Court found that the above guidelines gave proper effect to the provisions of NEPA as to ongoing projects. This finding is consistent with the basic and fundamental principle of administrative law as set forth in the case of *Udall* v. *Tallman,* 380 U. S. 1, 85 S.Ct. 792 (1965).

In said case, this Court addresses itself to the issue of administrative interpretation of statutes and held on page 16:

> "When faced with a problem of statutory construction this court shows great deference to the interpretations given the statute by the offices or agency charged with its administration . . . When the construction of an administrative regulation rather than a statute is in issue the deference is even more in order."

Again, in *Ehlert* v. *U. S.,* 402 U. S. 99, 91 S.Ct. 1319 (1971), this Court holds on page 105:

> ". . . we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation . . ."

It is evident that the deference given to an administrative agency is great, particularly when it ". . . involves a contemporaneous construction of a statute by the man charged with the responsibility for setting its machinery in motion . . ." *Power Reactivator Development Co.* v. *International Union of Electric Radio and Machine Workers,* 367 U. S. 396 at 408, 81 S.Ct. 1529 (1961).

After the trial on the merits, in which the District Court received evidence on the history of this project, its present status, its effect upon the environment, and the reassessment by the respondents, the District Court concluded that the respondents did not abuse their discretion in making the threshold decision that it was not practical to reassess the basic course of action.

There is *no evidence* that the respondent administrators abused their discretion in making this threshold decision. On the contrary, the evidence establishes that of the 135 ongoing major highway projects planned in this highway district, the respondent administrators concluded that 133 would require environmental impact statements. It was also determined that it was not practicable to reassess the basic course of action on the other two projects. The project involved in this action is one of those other two projects (Appendix 3, Findings of Fact and Conclusions of Law, page 36).

II. There is no conflict of decisions on the issue of laches and the District Court properly applied this doctrine.

It is respondents' contention, and the District Court so found, that the respondents complied with NEPA and that the guidelines authorize certain ongoing projects to be completed without a Section 102(2)(C) statement of NEPA.

Petitioners repeatedly contended that Section 102(2)(C) of NEPA should be retroactively applied

to this project and that laches should not bar this action. They cited *Arlington Coalition on Transportation* v. *Volpe,* 458 F.2d 1323 (C.A. 4th Cir. 1972), in support of this contention. *Arlington Coalition on Transportation* v. *Volpe, supra,* and the other cases cited by petitioners in support of this contention, involve the basic question of whether or not a project is subject to NEPA. In each of these cases, the defendants contend *that NEPA was not applicable.* That was the basic issue in each of these cases. No case cited by petitioners involved the reassessment procedure authorized by Section 11 of the Council on Environmental Quality Guidelines and Section 4(c) of the Federal Highway Administration's memorandum for ongoing projects. Interstate 5 was processed under this reassessment procedure. Therefore, the issue before this Court is not the retroactive application of NEPA, but did respondents comply with Section 11 of the Council on Environmental Quality Guidelines and Section 4(c) of the Federal Highway Administration's memorandum.

By interweaving cases involving the retroactive application of NEPA with the principle of laches, one might conclude that there is a conflict in decisional case law. However, if these unrelated issues are properly separated, it is crystal clear that the case law decisions are not in conflict. On the contrary, these decisions uniformly apply the doctrine of laches to the facts of the case.

In the instant case, the District Court applied the standard test for laches that this Court established in *Burnett* v. *New York Central Railroad Company*, 380 U. S. 424, 435; 85 S.Ct. 1050 (1965):

> " 'Whether laches bars an action in a given case depends upon the circumstances of that case and "is a question primarily addressed to the discretion of the trial court" [citation omitted].' "

The District Court received evidence on the development of the project, the money expended, the people displaced, the clearance of the right of way, the award of construction contracts, and the extent of actual construction. In addition, evidence was presented concerning petitioners' knowledge of the history of this project and their failure to take any positive action until suit was filed. Based on this evidence, the District Court concluded that laches was applicable.

The case of *Clark* v. *Volpe*, 342 F.Supp. 1324 (D.C.E.D. La. 1972) involved a similar factual situation, except for the fact that there was *no* attempt to comply with NEPA. The court held that laches was applicable and states on pages 1329 and 1330:

> ". . . It is inconceivable that plaintiffs, charged with knowledge of approximately fifteen years of publicity concerning the highway, were not on notice as of May 25, 1971 that actual construction would soon proceed unless legal action was promptly initiated. Nevertheless, plaintiffs stood idly by during the remaining months as bulldozers and chain saws stripped and leveled the land and as vast sums of public money were expended on

highway construction. Finally, after the area had been laid barren of trees or grass, and after several million dollars had been spent for highway development, plaintiffs, on February 24, 1972, belatedly filed suit to halt construction. The Court holds that, under the circumstances of this particular case, plaintiffs' delay in filing suit, during which delay the very acts of which they complain were being performed, was unreasonable, and defendants and intervenors would be substantially prejudiced if plaintiffs were allowed injunctive relief.

"In ruling as it does, the Court is keenly aware of the importance of preservation and protection of our parklands in particular and of the environment in general. . . . In the Court's opinion, it is logical to conclude that the Congress did not intend that plaintiffs should delay until after substantial alteration of the environment to demand studies as to the consequences of that alteration. Conversely, the statutes are designed to promote inquiry as to ecological impact *before* an area of natural beauty is affected. Had plaintiffs not procrastinated while bulldozers desolated a strip of land through the park and while vast sums of public money were expended, then they might have proceeded without prejudice to anyone. The Court is of the opinion that, unfortunately, plaintiffs did not take action until it was too late. The Court is compelled, therefore, to dismiss the action by application of the doctrine of laches."

CONCLUSION

This action was filed on November 2, 1972. Petitioners requested a temporary restraining order. The Court denied this request, but set the matter for trial on December 15, 1972, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure.

After a long and involved trial on the merits, the District Court found that the respondents complied with NEPA and that laches was applicable to the action.

Petitioners petitioned the District Court of Appeal for a stay pending appeal. The record on appeal contained the file of this action together with the petitioners' petition and our reply. The Appellate Court denied the stay.

We are now before this Court with the same issues and facts. Two lower courts have ruled on these matters adverse to petitioners. There are no new issues or facts that would justify a hearing on this matter. There is no conflict in decisional law.

Wherefore, Respondents respectfully pray that the Petition for a Writ of Certiorari to the Supreme Court of the United States be denied.

Dated: August 20, 1973

Respectfully submitted,

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Of Counsel
ELIAS D. BARDIS

APPENDIX 1

GUIDELINES FOR FEDERAL AGENCIES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

(Issued by the Council on Environmental Quality April 23, 1971)

STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT

3. *Agency and OMB procedures.* (a) Pursuant to section 2(f) of Executive Order 11514, the heads of Federal agencies have been directed to proceed with measures required by section 102(2)(C) of the Act. Consequently, each agency will establish, in consultation with the Council on Environmental Quality, not later than June 1, 1970 (and, by July 1, 1971, with respect to requirements imposed by revisions in these guidelines, which will apply to draft environmental statements circulated after June 30, 1971), its own formal procedures for (1) identifying those agency actions requiring environmental statements, the appropriate time prior to decision for the consultations required by section 102(2)(C), and the agency review process for which environmental statements are to be available, (2) obtaining information required in their preparation, (3) designating the officials who are to be responsible for the statements, (4) consulting with and taking account of the comments of appropriate Federal, State, and local agencies, including obtaining the comment of the Administrator of the Environmental Protection Agency, whether or not an environmental statement is prepared, when required under section 309 of the Clean Air Act, as amended, and section 8 of these guidelines, and (5) meeting the requirements of section 2(b) of Executive Order 11514 for providing timely public infor-

mation on Federal plans and programs with environmental impact including procedures responsive to section 10 of these guidelines. These procedures should be consonant with the guidelines contained herein. Each agency should file seven (7) copies of all such procedures with the Council on Environmental Quality, which will provide advice to agencies in the preparation of their procedures and guidance on the application and interpretation of the Council's guidelines. The Environmental Protection Agency will assist in resolving any question relating to section 309 of the Clean Air Act, as amended.

(b) Each Federal agency should consult, with the assistance of the Council on Environmental Quality and the Office of Management and Budget if desired, with other appropriate Federal agencies in the development of the above procedures so as to achieve consistency in dealing with similar activities and to assure effective coordination among agencies in their review of proposed activities.

(c) State and local review of agency procedures, regulations, and policies for the administration of Federal programs of assistance to State and local governments will be conducted pursuant to procedures established by the Office of Management and Budget Circular No. A-85. For agency procedures subject to OMB Circular No. A-85 a 30-day extension in the July 1, 1971, deadline set in section 3(a) is granted.

(d) It is imperative that existing mechanisms for obtaining the views of Federal, State, and local agencies on proposed Federal actions be utilized to the extent practicable in dealing with environmental matters. The Office of Management and Budget will issue instructions, as necessary, to take full advantage of existing mechanisms (relating to procedures for handling legislation, preparation of budgetary materials, new procedures, water resource and other projects, etc.).

11. *Application of section 102(2)(C) procedure to existing projects and programs.* To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

12. *Supplementary guidelines, evaluation of procedures.* (a) The Council on Environmental Quality after examining environmental statements and agency procedures with respect to such statements will issue such supplements to these guidelines as are necessary.

(b) Agencies will continue to assess their experience in the implementation of the section 102(2)(C) provisions of the Act and in conforming with these guidelines and report thereon to the Council on Environmental Quality by December 1, 1971. Such reports should include an identification of the problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on environmental aspects (and alternatives, where appropriate) of proposed actions without imposing unproductive administrative procedures.

RUSSELL E. TRAIN,
Chairman.

APPENDIX 2

SUBJECT: Interim Guidelines for Implementation of Section 102(2)(C) of the National Environmental Policy Act of 1969

4. **APPLICATION**

a. The State highway department (SHD)[1] shall evaluate the environmental consequences of all direct Federal, Federal-aid, Public Lands, Regional Development including Appalachia, Defense Access, Forest Highway, planning, research, and demonstration projects except those cited in paragraph 4b and make a determination in consultation with the division engineer (1) that a negative declaration is applicable because the project will have no significant affect upon the quality of human environment, or (2) that an environmental statement is necessary because the project will have or is likely to have a significant affect upon the quality of human environment.

b. The provisions of this memorandum do not apply to projects that received or receive design approval before February 1, 1971. Design approval may be established and documented in one of the following three ways, depending on when such design approvals were or are given. (1) prior to issuance of revised PPM 20-8 in January of 1969, procedures of the Bureau of Public Roads (BPR) did not require a SHD to receive design approval from the BPR before undertaking preparation of the plans, specifications

[1] The term State highway department means the agency with primary responsibility for initiating and carrying forward the planning and construction of the project.

and estimate (PS&E). Therefore, design approval was that action or series of actions by the BPR which indicated to the SHD that the essential elements of the highway (paragraph 10 of PPM 20-8) were satisfactory or acceptable for preparation of the PS&E. Such actions may have consisted of review and comments upon preliminary plans, schematic drawings, design studies, layouts, or reports. The SHD shall identify those projects (both Federal-aid and non Federal-aid) in the above catagory which it anticipates Federal-aid funds will be requested for a subsequent stage and furnish the division engineer for his concurrence a letter similar to Appendix D of this memorandum citing the document(s) which constitute the design approval. The division engineer's concurrence in the State's determination will serve as verification of previous design approval. (2) Written approval by the BPR of the design study report submitted in accordance with paragraph 10 of PPM 20-8 revised January 14, 1969. (3) For those projects which the SHD is presently preparing the construction PS&E and there is not documentary evidence that the BPR indicated its acceptance of the essential design elements prior to the SHD undertaking preparation of the PS&E, the SHD may furnish the FHWA copies of drawings, plans, or other material showing the present status of the plan preparation. The SHD shall submit such material and the FHWA division engineer shall advise the State in writing, prior to February 1, 1971, that the design for a project or for a proposal is approved if he determines that the present

status of the design or plan preparation meets the requirements for design approval outlined in paragraph 10 of PPM 20-8.

c. However, the following two types of projects must be reevaluated by the SHD even though such projects received design approval before February 1, 1971:

(1) projects on new locations, and

(2) major reconstruction projects which will require additional right-of-way over at least 50 percent or more of its length.

The SHD's reassessment, which shall be done in consultation with the division engineer, shall be made to determine if such projects were developed in such a manner as to minimize adverse environmental consequences. Such projects, *to the extent practicable,* should be modified to incorporate additional elements of features identified and considered prudent to minimize harm. No environmental statement need be submitted, however, unless requested by the division engineer.

d. Statements may be prepared for planning and research projects on the basis of the annual work program.

e. The provisions of this memorandum shall not apply to projects or programs of projects where the Federal Highway Administrator has made a formal determination that the project is urgently needed because of a national emergency, a natural disaster, a catastrophic failure, or for similar reasons of great urgency.

f. In those instances where a highway is being jointly planned by two or more agencies, or is one element of a jointly planned undertaking, only a single environmental determination and/or statement shall be made. The highway proposal submitted to the FHWA for approval (location, design, etc.) shall include a copy of the statement prepared and processed by another Federal agency or reference to such a statement previously furnished to FHWA. Highway projects in this category could include forest highways (where forest service handles the Environmental Policy Act requirements), defense access roads planned in conjunction with a defense installation and similar joint efforts.

APPENDIX 3

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND R. SULLIVAN, et al., *Plaintiffs,* v. JOHN A. VOLPE, et al., *Defendants.*	CIVIL NO. S-2609
CITY OF SACRAMENTO, a municipal corporation, *Plaintiff in Intervention,*	FINDINGS OF FACT AND CONCLUSIONS OF LAW
GRANITE CONSTRUCTION COMPANY, a corportion, and A. TEICHERT & SON, INC., a corporation, *Defendants in Intervention.*	

The above-entitled cause came on regularly for hearing on December 14, 1972, in the courtroom of the Honorable Philip C. Wilkins, United States District Judge. Plaintiffs appeared by and through their attorney Angus G. MacDonell, Esq. Plaintiff in Intervention appeared by and through its attorney James P. Jackson, City Attorney, by Richard H. Hyde and G. Richard Brown, Deputy City Attorneys. Defendants John A. Volpe, Sheridan E. Farin, and Donald Trull appeared by and through their attorney Dwayne Keyes, United States Attorney, by Richard W. Nichols, Assistant United States Attorney. Defendants California Department of Public Works, James A. Moe, and Robert Datel appeared by and through their attorney Harry S. Fenton, Chief Counsel of the California Department of Public Works, by Elias D.

Bardis and Daniel E. Wilcoxen, Attorneys for the California Department of Public Works. Defendant in Intervention Granite Construction Company, a corporation, appeared by and through its attorneys Grunsky, Pybrum, Skemp & Ebey, by Elmer Pybrum, Esq. Defendant A. Teichert & Son, Inc., a corporation, appeared by and through its attorneys McDonough, Holland, Schwartz, Allen & Wahrhaftig, by V. Barlow Goff, Esq., and Richard E. Brandt, Esq. Trial of the matter continued from December 14, 1972, through December 21, 1972. Evidence, by way of testimony, affidavits, documents, photographs, and other exhibits, was introduced. The matter having been argued by the parties, and the Court having taken the matter under submission for decision, and the Court being fully apprised in the premises, and good cause appearing therefor, the Court does now hereby make the following:

FINDINGS OF FACT

1. Interstate Highway 5 is part of the National System of Interstate and Defense Highways System, in which the United States of America is participating by supplying 90 percent of the cost of said highway. The terminals of Interstate 5 are the Canadian and Mexican borders. Interstate 5, which is 1,382 miles long, passes through the states of Washington, Oregon and California of which 797 miles is located in the State of California. All but 40 miles of Interstate 5 in California is completed except for minor alterations from Redding north to Oregon.

2. Plaintiff Raymond R. Sullivan resides at 3631 East Lincoln Way, Sacramento, California. This residence is approximately three-quarters of a mile from the nearest point at which the Interstate 5 passes.

Said residence is located within 1,000 feet of Freeport Boulevard, a main thoroughfare and State highway passing through the southern portion of the City of Sacramento. Land Park Drive, another main thoroughfare passing through the southern portion of the City of Sacramento, is located approximately halfway between Sullivan's residence and the Interstate 5 construction involved in this case.

3. Plaintiff James T. Marsh resides at 1109 Silver Lake Drive, Sacramento, California. This residence is approximately 600 feet from the nearest Interstate 5 construction involved in this case. Plaintiff Marsh has lived in said house since March 1964, and purchased it in January 1970. During all of the time he lived in said house, Marsh knew of the plans for the proposed routing of Interstate 5, as more specifically described hereinafter in these findings.

4. Plaintiff in Intervention City of Sacramento is a municipal corporation through which a portion of the Interstate 5 will pass. Said plaintiff in intervention has taken no steps to control land usage in areas abutting and adjoining the proposed freeway, since the routing of said freeway was adopted.

5. Defendant John A. Volpe is the Secretary of Transportation of the United States of America, and has the overall authority and responsibility for approval and supervision of programs conducted by the Federal Highway Administration (hereinafter referred to as FHWA), an agency within the Department of Transportation. Defendant Sheridan A. Farin is the Administrator for Region 9 of the FHWA, and is responsible for approval and supervision of programs conducted by FHWA within said Region, within which the instant construction of Interstate 5 is pend-

ing. Defendant Donald E. Trull is the Division Engineer of the FHWA in the State of California, and is responsible for approval of federal-aid highway programs within the State of California, including portions of the interstate highway system in California. Said defendants are hereinafter referred to collectively as the "federal defendants".

6. Defendant California Department of Public Works is an agency of the State of California, authorized and directed to provide for the construction of all State highways, including those which are part of the interstate system of federal-aid highways, on locations designated by the California Highway Commission. Defendant James A. Moe is the Director of the California Department of Public Works, and is charged with the overall control and supervision of the activities of said Department. Defendant Robert Datel is the State Highway Engineer and Chief of the Division of Highways, a subagency within the Department of Public Works, and said defendant is charged with the overall control and supervision of the activities of said Division. Said defendants are hereinafter referred to collectively as the "state defendants".

7. Defendant in Intervention Granite Construction Company, a corporation, is a corporation which has contracted with defendant California Department of Public Works for the construction of the Segment A—Granite portion of Interstate 5, as more specifically hereinafter described. Said construction is presently proceeding. Defendant in Intervention A. Teichert & Son, Inc., a corporation, is a corporation which has contracted with defendant California Department of Public Works for the construction of the Segment A—Teichert portion of Interstate 5, as more specifically

hereinafter described. Said construction is presently proceeding.

8. The portions of Interstate 5 at issue in this case are as follows: Broadway (Vallejo Way) south to 43rd Avenue (described herein as "Segment A—Granite"), 43rd Avenue south to Pocket Road (described herein as "Segment A—Teichert"), Pocket Road south to Beach Lake (described herein as "Segment B"), and Beach Lake south to Lambert Road (described herein as "Segment C"). Construction has already commenced on Segment A—Granite, and on Segment A—Teichert. There has been location and design approval as to Segments B and C, and bids are to be advertised as to said segments shortly.

9. Interstate 5 (as located in the City and County of Sacramento) was initially planned in the mid-1950s. The State of California, the County of Sacramento, and the City of Sacramento, jointly and individually, studied the various route alternatives of Interstate 5 as it was to pass through Sacramento County. The proposed routing of Interstate 5, as it is presently under construction, was known to and incorporated by the City of Sacramento in its 1958 general plan.

10. Public hearings were held by the California Highway Commission in connection with the adoption of the present route of Interstate 5. On April 21, 1960, a public hearing was held by said Commission involving route location of Segment C and most of Segment B of Interstate 5. The said route location was adopted, after said hearing, on April 13, 1961. On January 30, 1962, and again on May 17, 1962, public hearings were held involving route location of the remaining portion of Segment B, and all of Segment A. The said

route location was adopted by the Commission, after said hearings, on June 26, 1962. These hearings were well attended by the public and received a great deal of exposure in the local newspapers. Interstate 5 in Sacramento County was, in general, a *cause celebre* during the 1960s, with much public discussion.

11. The FHWA granted location approval of Segment C and most of Segment B on May 9, 1961, and granted location approval of the remainder of Segment B and all of Segment A on June 29, 1962. FHWA granted basic design approval of Segment C and most of Segment B on September 20, 1961, and granted basic design approval of the remainder of Segment B and all of Segment A on August 16, 1962. Subsequent minor revisions of said design approvals occurred thereafter, the last of which occurred on July 30, 1968.

12. The State of California entered into freeway agreements with the County of Sacramento on October 9, 1961, and with the City of Sacramento on June 13, 1963. Said agreements, in accordance with state law, detailed such basic design features as rearrangement of local roads and streets and location of interchanges. These freeway agreements were subsequently modified, the final modification having occurred on September 8, 1969.

13. The State of California received authorization from FHWA to procure right-of-way, and the right-of-way acquisition program was funded for Segment A during the fiscal year 1962–1963. The right-of-way acquisition program was funded for Segments B and C during the fiscal year 1963–1964. The State of California has acquired title to all the right-of-way involved in the construction of these portions of Interstate 5, by

acquiring 361 parcels directly from the property owners and instituting condemnation proceedings on the remaining 28 parcels. The State of California has expended $12,347,195.00 on right-of-way acquisition, and has removed the improvements that existed on the right-of-way. The State of California has also displaced approximately 500 persons in connection with said right-of-way acquisition.

14. Since the right-of-way acquisition authorization, the State of California has been involved in utility relocation in connection with and preparation for the construction of those portions of Interstate 5 involved in this action. This relocation has involved gas, telephone, power, drainage, sewer and water lines. The sum of $1,405,196.58 has been expended by the State of California on such relocation, involving 41 various utility agreements. The remaining utility relocation will cost the State of California an estimated $153,-110.21.

15. The community of Sacramento has developed on the basis of the proposed routing of Interstate 5. City and County general development plans and other area general development plans have been predicated on the construction of Interstate 5. Subdivisions have developed adjacent to the proposed right-of-way line. Streets, sewers, water mains, and power facilities have been planned and constructed on the assumption that Interstate 5 would be constructed as planned.

16. In their planning relating to the construction of Interstate 5, the state and federal defendants have taken into consideration, among other things and without limitation by the following list, factors involving the effect of Interstate 5 upon flora and fauna, archeological studies, aesthetic considerations, noise control,

air pollution control, preservation of community integrity and street continuity, utility planning and design, recreational improvements, levee control, and community dependence upon the planned freeway over a substantial period of time. In these considerations the state and federal defendants have been abundantly cautious to preserve environmental considerations to the maximum practicable extent.

17. NEPA became effective on January 1, 1970. Section 102(2)(C) of NEPA directed that there be prepared in connection with major federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official, relating to the environmental impact of the proposed action, unavoidable adverse environmental effects therefrom, alternatives thereto, short-term and long-term goals, and irreversible commitments of resources. Provision was made in said section for appropriate consultation. Pursuant to NEPA, the Council on Environmental Quality (hereinafter referred to as CEQ) promulgated interim guidelines on April 30, 1970. Said guidelines were finalized on April 23, 1971, and published at Volume 36, Page 7724 of the Federal Register. Section 11 of said final guidelines provides as follows:

> "11. *Application of section 102(2)(C) procedure to existing projects and programs.* To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still im-

portant that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequencies not fully evaluated at the outset of the project or program."

18. Pursuant to the directives of NEPA and the CEQ, the FHWA issued its interim guidelines on November 24, 1970. Provision was made in section 4 thereof for the reassessment of ongoing projects which were on new location. Said FHWA interim guidelines provided that "The State highway department (SHD) shall evaluate the environmental consequences of all . . . Federal-aid . . . planning, research and demonstration projects . . . ." Said guidelines further provided that:

> "The SHD's reassessment, which shall be done in consultation with the [FHWA] division engineer, shall be made to determine if such projects were developed in such a manner as to minimize adverse environmental consequences. Such projects, *to the extent practicable,* should be modified to incorporate additional elements of features identified and considered prudent to minimize harm. No environmental statement need be submitted, however, unless requested by the division engineer." (emphasis in original).

The FHWA interim guidelines have subsequently been finalized, without substantive change in this area, in the FHWA's Policy and Procedure Memorandum (PPM) 90-1.

19. Pursuant to the provisions of § 11 of the CEQ guidelines, and § 4 of the FHWA interim guidelines, officials of the FHWA and defendant California De-

partment of Public Works, Division of Highways, met together in Marysville, California, on February 17, 1971, to reassess the planning and development involved in the proposed construction of Interstate 5. At said time, the state and federal defendants concluded, in consultation with each other, that the Interstate 5 project had been developed in such a manner as to minimize adverse environmental consequences. Accordingly, they concluded that an environmental impact statement, such as described in Section 102 (2)(C) of NEPA, was not required. There are 135 major highway projects planned in this District of the Division of Highways. Federal and state defendants determined that 133 of these projects would be processed with environmental impact statements. Because of the advanced stage of the other two projects, it was determined that it was impractical to alter their basic course of action and they were processed by environmental fact sheets. This Interstate 5 project was one of the two such projects.

20. Subsequent to said reassessment, the California Division of Highways submitted an "environmental fact sheet" dated March 10, 1971, relating to Segment A, to the FHWA. Said environmental fact sheet contained a detailed discussion of some but not all of the factors considered by the state and federal defendants in their reassessment. Said fact sheet was not required under the procedure set forth in § 11 of the CEQ guidelines and § 4 of the FHWA interim guidelines. The cover letter to said fact sheet recited that an environmental impact statement as to said portion of Interstate 5 would not be prepared. Said fact sheet was approved by defendant Trull of the FHWA on April 30, 1971. On May 25, 1971, the California Di-

vision of Highways submitted an "environmental fact sheet" of said date relating to Segments B and C of Interstate 5, to the FHWA. Said environmental fact sheet contained a detailed discussion of some but not all of the factors considered by the state and federal defendants in their reassessment. Said fact sheet was not required under the procedure set forth in § 11 of the CEQ guidelines and § 4 of the FHWA interim guidelines. The cover letter to said fact sheet recited that an environmental impact statement would not be prepared. Said fact sheet was approved by defendant Trull of the FHWA on June 14, 1971.

21. On May 30, 1972, the California Division of Highways was authorized to advertise, and did advertise, for receipt of bids for construction of a portion of Segment A. Bids as to said segment were opened on July 26, 1972, and the FHWA concurred in the award of the contract for construction of said segment to Granite Construction Company on August 9, 1972, in the sum of $12,180,302.00. Said contract was awarded to Granite Construction Company on August 15, 1972. On-site work under said contract actually started on September 15, 1972, although considerable preparatory work on said project had been undertaken by Granite prior to the on-site work. The advertising of this construction project was covered by the local newspapers. On May 31, 1972, both the Sacramento Bee and the Sacramento Union contained articles indicating that the state and federal defendants were presently advertising this project for construction. The Sacramento Bee carried notices of advertising on July 12 and July 19, 1972. The Sacramento Union announced the bid opening on July 27, 1972.

22. On June 28, 1972, the California Division of Highways was authorized to advertise, and did advertise, for receipt of bids for construction of the other portion Segment A. Bids as to said segment were opened on September 6, 1972, and on September 27, 1972, the FHWA concurred in the award of the contract for construction of said segment to A. Teichert & Son, Inc., in the sum of $6,343,748.00. Said contract was awarded to A. Teichert & Son, Inc., and on-site work under said contract actually started on October 2, 1972, although considerable preparatory work on said project had been undertaken by Teichert prior to the on-site work. The advertising of this construction project was covered by the local newspapers. On July 26, 1972, the Sacramento Bee and on July 27, 1972, the Sacramento Union contained articles indicating that the state and federal defendants were presently advertising this project for construction. The Sacramento Union carried notice of advertising on August 23 and August 30, 1972. The Sacramento Union announced the bid opening on September 8, 1972.

23. As of December 19, 1972, construction under the Granite contract was approximately 12 percent completed, and Granite had earned for work completed approximately $1,600,000.00. Granite is employing sixty-eight (68) employees on said job, with an average weekly payroll of $28,000.00. Granite has forty-six (46) pieces of major equipment on the job site, with an aggregate value of $1,800,500.00, and a monthly rental value of $88,900.00. Granite has negotiated twenty-five (25) subcontracts with an aggregate price of $4,440,000.00, and those subcontractors employ eighty-six (86) employees with a weekly payroll of approximately $34,400.00. Those subcontractors

have seventy-five (75) pieces of major equipment on the job site, with an aggregate value of $1,500,000.00, and a monthly rental value of $96,000.00. Granite has thirteen (13) outstanding purchase orders in connection with said project, with an aggregate price of $1,012,000.00. An injunction prohibiting Granite from continuing with its work in performance of said contract would cause a monthly loss to the community and to Granite Construction Company of not less than $448,600.00 as follows: (a) $233,000.00 lost wages from employee lay-offs, (b) $88,900.00 loss of use of equipment of Granite, (c) $62,500.00 administrative costs in connection with the job, (d) $24,-200.00 for erosion control, street maintenance, drainage maintenance and public safety, and (e) $40,000.00 loss of profits. Additionally, Granite would be faced with problems resulting from its existing purchase orders ($1,012,000.00), tied-up bonding capacity ($12,-000,000.00), delays in the completion of the work causing costs to increase, recruitment of new personnel upon resumption of work, repair of deterioration occurring during the delay, and inconvenience to the public by reason of the necessity for reduced speeds through the project site.

24. As of December 20, 1972, construction under the Teichert contract was approximately 5 percent completed, and Teichert had earned for work completed approximately $300,000.00. There are approximately one hundred (100) workmen employed on the Teichert job, with an average monthly payroll of $150,000.00. Construction of the Gloria Drive sewer line is approximately 50 percent completed, clearing on the project is 100 percent completed, and fencing is 25 percent completed. An injunction prohibiting Teichert from continuing with its work in performance of said

contract would cause a loss to Teichert and to the community as follows: (a) $87,000.00 under agreement for sale of imported borrow, which must be removed on or before August 15, 1973, (b) purchase orders for materials on the project in the sum of $480,000.00, (c) twelve subcontracts in the aggregate sum of $1,726,428.00, (d) increase in job overhead presently estimated at $8,000.00 per month and general overhead attributable to the project presently estimated at $15,000.00 per month, (e) move-in and move-out costs, and (f) other costs of a general nature similar to those described as accruing to Granite in paragraph 23 of these findings of fact. Teichert has incurred costs of $3,500,000.00, or more than half of the total contract price.

25. The State of California has incurred costs of and expended, the sum of approximately $19,500,000.00 to date on these portions of Interstate 5, as follows: (a) $3,500,000.00 for engineering, (b) $12,000,000.00 for right-of-way, (c) $1,500,000.00 for utility relocation, and (d) $2,500,000.00 to the contractors.

26. The environmental fact sheets described in paragraph 20 of these findings of fact are public documents, and are available to the public on request. They were in fact referred to at a public hearing conducted by the County of Sacramento in February 1972 concerning the proposed addition of an interchange on this project. State officials also testified at said hearing that an environmental impact statement was not prepared on this project, and that the project was proceeding under the environmental fact sheets.

27. Plaintiffs Sullivan and Marsh were aware of the proposed construction of Interstate 5 for several

years prior to the start of actual construction. They undertook no investigation to determine if an environmental impact statement had been prepared, although they are both intelligent individuals capable of ascertaining this fact with a minimum of effort. Plaintiff Sullivan contacted the Environmental Defense Fund concerning this project in early July 1972, prior to the award of the Granite and Teichert contracts, but this suit was not brought until November 2, 1972, after substantial construction had already occurred and the right-of-way had been substantially cleared in Segments A—Granite and A—Teichert.

28. Plaintiff in Intervention City of Sacramento is charged with knowledge of the provisions of NEPA, the CEQ guidelines, and the FHWA guidelines, as they apply to ongoing projects. The City of Sacramento could not reasonably rely upon the assumption that the construction of these portions of Interstate 5 would be processed with an environmental impact statement, and the City was under a duty to ascertain the true facts, a duty it failed to perform.

29. Plaintiffs allege various factors that were not adequately considered by the federal and state defendants in the development of this project. Among the factors alleged are air pollution, lack of consideration for land use plans, disruption of municipal services, noise pollution, depletion of land in urban areas and trees, aesthetics, and ecological spectrum of streams, marshlands and other areas along the route. Plaintiff offered little evidence at the trial of this action of the above factors, with the exception of noise pollution. Federal and state defendants testified to each of the above factors, indicating extensive investigation and research into each of the factors and es-

tablished to the satisfaction of the Court that these factors were, indeed, considered by federal and state defendants in the development of this project.

With respect to sound pollution, state and federal defendants conducted extensive studies and investigation concerning this problem, and as part of this project are providing sound barriers in order to protect development that existed at the time of route adoption. These barriers will cost $700,000.00, and are consistent with, or exceed, existing state and federal standards relating to sound impact.

And from the foregoing Findings of Fact the Court does hereby make the following:

CONCLUSIONS OF LAW

1. Plaintiffs Raymond R. Sullivan and James T. Marsh are barred from any relief in this action by reason of laches and unreasonable delay, in that they failed to bring this action, seeking injunctive relief, until November 2, 1972, although they had actual knowledge of the planned construction of this portion of Interstate 5 for a substantial period of time prior to said date. By reason of their delay, defendants and defendants in intervention would be unjustly harmed by the issuance of an injunction in this action.

2. Plaintiff in intervention City of Sacramento is barred from any relief in this action by reason of laches and unreasonable delay, in that it failed to bring this action until December 11, 1972, although it had constructive knowledge of the planned construction of this portion of Interstate 5 without the issuance of an environmental impact statement since April 30, 1971 (as to Segment A) and since June 14, 1971 (as to that portion of Segment B located within the City of Sacramento).

3. All members of plaintiffs' purported class are barred from relief in this cause for the same reasons that plaintiffs Sullivan and Marsh are so barred. To the extent that there may be persons not so barred, they are not members of a class of persons of whom plaintiffs are typical, and are therefore not members of the class of persons purported to be represented by plaintiffs.

4. The state and federal defendants acted, with respect to the portions of Interstate 5 involved in this action, in full compliance with the requirements imposed upon them by NEPA, Section 11 of the CEQ guidelines, and Section 4 of the FHWA interim guidelines. Said guidelines give proper effect to the provisions of NEPA as to ongoing projects, as applied to the facts of this case. Accordingly, plaintiffs, members of their purported class, and plaintiff in intervention, are all precluded from relief.

5. The state and federal defendants did not abuse their discretion in determining that it was not practicable to alter the basic course of action of the portions of Interstate 5 involved in this action. In this connection the state and federal defendants could properly have concluded, and this Court concludes, that (a) there has been massive participation of the local community in the planning of this project, (b) the state and federal defendants have been extremely sensitive to the impact this project will have on the environment and have taken environmental factors into account in their planning of this project, (c) the likelihood of harm to the environment from this project is minimal, especially in contrast to the present status of cleared right-of-way and partially completed construction, and also in consideration of the

heavy reliance of the Sacramento community in planning the development of said community upon the proposed freeway, (d) the cost to the state and federal defendants, and to the defendants in intervention, of halting construction while an environmental impact statement is prepared is immense, and (e) that to the extent practicable, this project was modified to incorporate additional features to minimize its impact.

By reason of each of the foregoing Findings of Fact and Conclusions of Law, plaintiffs and plaintiff in intervention are not entitled to a preliminary injunction, a permanent injunction, or any other relief as prayed for in the complaint. Let judgment be entered in favor of defendants and defendants in intervention accordingly.

Dated this 14th day of February, 1973.

UNITED STATES DISTRICT JUDGE

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